IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 1111 OF 2005

Shri Anant Bhagwan Munankar ... Appellant

V/s

Kum. Chandrakala Sakharam Munankar & ors. ... Respondents

Mr. D.S. Mhaispurkar i/by Ms. Vaidehi Mhaispurkar for the appellant.

CORAM: P.V. KAKADE, J.

DATED: 3RD OCT., 2005

P.C.:

1. This is an appeal preferred by the appellant against the judgment and order passed by the District & Sessions Judge, Sindhudurg - Oros, dismissing the appeal and confirming the judgment and order passed by the Jt. Civil Judge, J.D., Kudal dated 4.2.2003 dismissing the plaintiff's suit for declaration and permanent injunction against the defendents.

2. I have heard the learned counsel for the appellant. Perused the record.

3. The plaintiff filed the suit for declaration that he

had become owner of the suit land by virtue of registered will deed dated 5.6.1991 executed by one Sakharam Ladoji Munankar in his favour and, therefore, also sought permanent injunction against the defendants restraining them from obstructing and interfering in plaintiff's possession in the suit property.

Defendants contested the suit inter-alia denying all the allegations of the plaintiff and sought dismissal of the suit.

4. The Trial Court adjudicated the dispute on merits and came to the conclusion that the plaintiff had failed to prove his will dated 5.6.1991 executed by Sakharam Ladoji Munankar and, as such, he was held not to be in lawful possession of the suit property and, therefore, was not entitled for any relief claimed and dismissed the suit.

The appeal was carried to the District Court. The learned District & Sessions Judge, after hearing both parties, came to the conclusion that the learned Trial Judge appreciated the available evidence in proper perspective and recorded findings that the suit will was not proved and dismissed the appeal. Hence the present

appeal.

5. At the outset, it may be noted that, the only question raised is regarding illegality of the will on record. It appears that one attesting witness who was examined had turned hostile and the other contesting witness did not remain present though summoned and no further effort was made to secure his presence. The evidence of scribe also did not support the plaintiff's case. On this back ground, both the courts below come to the conclusion that the mandatory provision under Sec.63 of the Indian Succession Act was not complied with and provision of Sec.71 of the Evidence Act was not available for the plaintiff because it is required to be invoked only if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence sought to be brought on record, is also of no use for the plaintiff in order to establish the will. Moreover, it is not the case that the attesting witnesses were dead or either otherwise not available so as to rely upon the other evidence by virtue of Sec.71 of the Indian Evidence Act. It is the case that the witness who was examined turned hostile and it is not that he was stating false against the plaintiff in respect of attestion of the document.

6. Under the circumstances, the evidence recorded by both the Courts below to the effect that the will is not properly proved, has to be upheld and, therefore, the appeal deserves to be dismissed. In the result, the appeal stands dismissed with no order as to costs.

.....